

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case # 05CV0329-GKF-PJC

**DEFENDANTS’ JOINT BRIEF IN REPLY TO PLAINTIFFS’ RESPONSE
TO MOTION *IN LIMINE* TO EXCLUDE REFERENCES TO TRADE
ORGANIZATIONS OR ORGANIZATIONAL DOCUMENTS, COMMUNICATIONS,
SEMINARS, OR MEETINGS WITHOUT SPECIFIC EVIDENCE THAT ALL
DEFENDANTS WERE MEMBERS, ATTENDED, OR RECEIVED SUCH DOCUMENTS
OR COMMUNICATIONS [DKT. NOS. 2430 AND 2504]**

I. Discussion

Plaintiffs attempt to support their opposition to Defendants’ Motion *in Limine* with inaccurate characterizations of the evidence. For instance, Plaintiffs claim that The Poultry Federation’s Marvin Childers, who started working for the Federation only in 1997, “confirmed that at least one entity related to each of [] Defendants has been a member of [T]he Poultry Federation (and its board of directors) over the years.” *See* Dkt. No. 2504, Plaintiffs’ Opposition to Defendants’ Motion *in Limine* [Dkt. #2430], page 9 (*citing* Deposition of M. Childers, pages 21-26). Plaintiffs’ assertion is wrong, and Mr. Childers did not testify that each Defendant – or even an “entity related” to each Defendant – has maintained over the years continual

membership or board directorship in The Poultry Federation. To the contrary, Mr. Childers explained that this information is unavailable, as records of membership duration in The Poultry Federation do not exist. *See* Deposition of M. Childers, page 23:1-6 (when asked if “the Federation obtain[s] records of how long individuals or entities have been members,” Childers testified: “No. I was told that you would ask that question. And we do not have [that].”) Furthermore, Mr. Childers confirmed specifically that – at the time of his deposition – neither Defendant Cargill, Inc., nor Defendant Cargill Turkey Production, LLC, had “a representative on the board.” *See* Deposition of M. Childers, pages 24:20-22 and 25:6-8. And while Mr. Childers testified that a representative of Defendant George’s, Inc. joined the board of directors “in July of 2007,” Deposition of M. Childers, page 23:20-25, indisputably George’s, Inc. for “a number of years” was not a member of The Poultry Federation. *See* Deposition of Benny McClure, August 15, 2007, pages 101:13 – 102:1.¹

Instead of contradicting Defendants’ Motion, Mr. Childers’ testimony in fact supports the proposition that suggestions of any trade organization speaking for all Defendants should be

¹ Plaintiffs’ accusation that Defendants’ Motion “stretches” testimony of Monty Henderson is likewise unwarranted. *See* Dkt., No. 2504, Plaintiffs’ Opposition to Defendants’ Motion *in Limine* [Dkt. #2430], page 9. In the Motion, Defendants establish as irrelevant “content of [trade association] seminars...if offered for purposes of establishing that the seminars (and their content) are authorized by, imputed to, and binding upon all of Defendants, particularly considering not all of Defendants were in attendance at all seminars.” *See* Dkt. No. 2430, Motion at 4. Defendants illustrate this point with evidence that Mr. Henderson had not attended U.S. Poultry & Egg Association seminars in “a few years”. Despite Plaintiffs’ suggestion, Defendant George’s, Inc.’s membership in U.S. Poultry & Egg Association was not referenced or denied.

prohibited. *See* Dkt., No. 2414, Motion *in Limine* to Prohibit Any Suggestion by Plaintiffs that Any Trade Organization Speaks for Any Defendant. When asked directly, Mr. Childers denied that “one of the functions of the Federation [is] to be the spokesperson for the industry....” Deposition of M. Childers, page 27:8-12. Furthermore, Mr. Childers also explained that members of The Poultry Federation include “allied vendors,” “friends,” and “growers,” in addition to poultry companies. *See* Deposition of M. Childers, pages 13:6-16 and 17:23 – 18:1. Consequently, any contention or suggestion by Plaintiffs that The Poultry Federation – or any other trade organization – with a membership varied in nature and number, speaks for one, some, or all Defendants should be barred.

Similarly, the case law cited in Plaintiffs’ response does not support denial of Defendants’ Motion. Both *Dartez v. Fibreboard Corp.* and *Kisner v. Gehl Co.* involved product liability litigation and concepts – implicating issues such as “state of the art” and strict liability – which are irrelevant, confusing, and misleading in the instant case. *Dartez*, 765 F.2d 456 (5th Cir. 1985) and *Kisner*, 184 F.3d 1259 (10th Cir. 1999). Superimposing the elements of product-liability torts onto Plaintiffs’ RCRA-, nuisance-, and trespass-based claims is not appropriate, and Plaintiffs’ proffer of evidence under a products analysis should be rejected.²

² The so-called “Restatement §427B” issue raised in pages 3 through 6 of Plaintiffs’ Opposition, *see* Dkt. No. 2504, has been briefed and argued to the Court on multiple occasions and will not be addressed again here.

II. Conclusion

For the reasons stated herein and in Defendants' Motions *in Limine*, Dkt. Nos. 2414 and 2430, references to trade organizations or organizational documents, seminars or meetings without any specific evidence that all Defendants were members, attended such seminars or meetings, or received such documents or communications, and any suggestion that any trade organization has spoken for or does speak for all Defendants, would unfairly characterize each Defendant with evidence attributable to only one, some, or even none of Defendants, thereby confusing the evidence, misleading the jury, and prejudicing all Defendants. Accordingly, the proffer of any such evidence – in this manner for these purposes – should be prohibited.

Respectfully submitted,

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